

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF LABOR-MANAGEMENT STANDARDS

LMRDA: Interpretation of
the “Advice” Exemption

RIN 1215-AB79
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COMMENTS OF THE AMERICAN FEDERATION OF TEACHERS

The American Federation of Teachers, AFL-CIO (hereinafter, AFT), on its own behalf and on behalf of its state and local affiliates across the country, submits these comments in response to the Department of Labor’s notice of proposed rulemaking with regard to the “advice” exemption to the reporting requirements stated in § 203 of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 433, regarding activities by labor consultants that have the object, “directly or indirectly,” of “persuad[ing] employees” with regard to the exercise of their rights to “organize and bargain collectively.” 76 Fed. Reg. 36178 (June 21, 2011). The AFT urges that the proposed rule be adopted.

The AFT is a labor organization subject to the Labor-Management Reporting and Disclosure Act of 1959 (hereinafter, LMRDA). It represents 1.5 million pre-K through 12th-grade teachers; paraprofessionals and other school-related personnel; higher education faculty and professional staff; federal, state and local government employees; nurses and healthcare workers; and early childhood educators. The AFT is a member of the AFL-CIO. We are in full agreement with the comments submitted by the federation in connection with this rulemaking and do not intend to rehash the arguments therein. We do write separately, however, to provide argument and examples of why the change to the application of the advice exemption is necessary, appropriate, and long overdue.

I. The Advice Exemption

As the AFL-CIO explains in its comments, modern-day labor consultants run elaborate

anti-union campaigns on behalf of their client, company management, and are engaged in an activity primarily designed to influence or persuade the target group, not to provide advice to the client. The proposed rule therefore correctly requires labor consultants to report such activities.

As the AFL-CIO correctly notes, “the Department’s current interpretation of the ‘advice’ exception has allowed consultants to escape reporting on their campaign ‘activities’ through the device of using the employer’s supervisors and managers to deliver the consultant’s antiunion message, even where the ‘real underlying motivation,’ *ibid.*, is clearly ‘to persuade employees.... not to exercise . . . the right to organize and bargain collectively,’” 29 U.S.C. § 433(a)(4).

Oftentimes, consultants will argue that their activities constitute legal advice that is or ought to be privileged. While it may be true that some of these consultants do provide genuine legal advice to their clients, that is the activity which will be reported under the proposed rule.. There are existing rules promulgated by the Department that exempt entities from reporting in instances where an attorney is engaged in providing actual legal advice.

The consultants who create anti-union materials are not required to report under the Department’s current interpretation of the “advice” exemption, just so long as they have the employer’s managers and supervisors distribute the consultants’ materials for them. This distribution procedure is an artifice that subverts the purpose of the statute. As the AFL-CIO argues, the proposed revision of the Department’s interpretation of the “advice” exemption closes this massive loophole by clarifying that the “advice” exemption will not be “mechanically or perfunctorily applied” to allow employers and consultants to escape reporting through the device of having the consultant undertake its persuader activities by directing the employer’s supervisors and managers.

II. The Anti-Union Consultant Industry and the AFT

Over the years, the AFT has been subject to the tactics of the anti-union consultant industry. Under almost all circumstances, the industry has hidden behind the “advice exemption” and has not been required to report its activities. Below are listed some selected examples of persuader activity directed at the AFT. Upon information and belief, none of it required reporting on behalf of the anti-union consultant.

At a large research institution connected to a university in upstate New York, anti-union consultants issued a lengthy manual for supervisors, which was placed on line. They trained supervisors in conducting one-on-one meetings with workers to dissuade them from voting for the union. Additionally, they drafted emails and letters sent to workers by management. None of this activity was reported due to the current interpretation of the “advice exemption.”

During an organizing drive at an early childhood educational employer in New York, a consultant was hired who trained staff to conduct one –on-one meetings with the staff, group meetings with other employees, and draft letters to workers homes from management. None of this activity is reportable according to the current interpretation of the “advice exemption.”

At a foundation in New York State, the union held an organizing drive where the consultant provided significant research for management. Management used this research to publicize the salaries of union staff, prepare letters to go to workers from management, and they used it in one-on-one meetings with the staff. All of this research currently falls within the Department’s interpretation of the “advice exemption.”

There is a multi million dollar industry of anti-union consultants who specialize in providing anti-union consulting to the hospital industry. At an acute care facility in New York, a consultant prepared anti-union literature that was handed out to workers by management. There were also one-on-one meetings between managers and workers. The managers had been trained

to conduct these meetings by the consultant. None of this activity was reportable under the Department's current interpretation of the advice exemption.

These are but a few examples of activities by an industry that has hidden behind the "advice exemption" so that their practices would not see the light of day.

III. Conclusion

It is time for the Department to begin to apply the "advice exemption" in a sensible manner that reflects the purpose of the statute. The Department's proposals will accomplish this goal and should, therefore, be adopted.

Respectfully submitted,

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